

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 99-O-02

DATE ISSUED: April 5, 1999

ISSUED TO: Steve Spilde, North Dakota Insurance Reserve Fund

CITIZEN'S REQUEST FOR OPINION

On December 1, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mr. Raymond Dohman asking whether the North Dakota Insurance Reserve Fund violated N.D.C.C. § 44-04-18 by denying him access to some of its records.

FACTS PRESENTED

On May 17, 1993, a legal action was filed in the United States District Court in Fargo, North Dakota, against two Grand Forks County deputy sheriffs in their official capacities. The claim arose out of the deputies' arrest of the plaintiff on April 4, 1992. The claim alleged personal injuries and violations of the plaintiff's civil rights due to the alleged use of excessive force during the arrest. The claim was settled out of court sometime in May or June of 1995.

Mr. Dohman apparently learned of the case during the fall 1998 election for Grand Forks County Sheriff. By letter dated November 12, 1998, Mr. Dohman asked North Dakota Insurance Reserve Fund (NDIRF) Chief Executive Officer Steve Spilde for "all written and taped information relating to a civil lawsuit by Neil Thompson" against Grand Forks County and others regarding an incident that occurred sometime in 1992. Mr. Spilde denied the request in a letter dated November 17, 1998, indicating "[i]t is the company policy of [NDIRF] that claim files are confidential. Therefore, I am unable to comply with your request." Following Mr. Dohman's opinion request to this office, Mr. Spilde obtained and sent to Mr. Dohman a complete copy of the federal district court record in the Thompson case, consisting of several hundred pages. Mr. Spilde also has offered to tell Mr. Dohman the amount of the final settlement of the case.

NDIRF's articles of incorporation as a North Dakota nonprofit corporation were executed on July 23, 1986, but were not filed with the Secretary of State until July 5, 1989. According to the articles, the purpose of NDIRF "is to establish a fund for self-insurance by the members against various types of property and casualty risks to which they and their employees are exposed in the ordinary course of their operations."

In its annual report to the Secretary of State, NDIRF indicated that its income is exempt from federal income tax liability under 26 U.S.C. § 115, which states: "Gross income does not include - (1) income derived from . . . the exercise of any essential governmental function and accruing to a State or any political subdivision thereof" To be eligible for a tax exemption under this section, it is therefore necessary that NDIRF's income accrue to its political subdivision-members and that NDIRF performs an "essential governmental function."

ISSUES

1. Whether the North Dakota Insurance Reserve Fund is a "public entity" as defined in N.D.C.C. § 44-04-17.1 and therefore subject to N.D.C.C. §§ 44-04-18 and 44-04-19, the state open records and meetings laws.
2. Whether there is any exception to N.D.C.C. § 44-04-18 which would apply to any or all of the information contained in the claim files maintained by NDIRF.

ANALYSES

Issue One:

All records and meetings of a "public entity" are required to be open to the public unless otherwise specifically provided by law. N.D.C.C. §§ 44-04-18, 44-04-19. This office has summarized the ways in which a nonprofit corporation may be subject to the open records and meetings laws:

1. The organization is delegated authority by a governing body of a public entity. See N.D.C.C. § 44-04-17.1(6) (definition of "governing body").
2. The organization is created or recognized by state law, or by an action of a political subdivision, to exercise public authority or perform a governmental function. See N.D.C.C. § 44-04-17.1(12)(a) (definition of "public entity").

3. The organization is supported in whole or in part by public funds or is expending public funds. See N.D.C.C. § 44-04-17.1(9), (12)(c) (definitions of "organization or agency supported in whole or in part by public funds" and "public entity").
4. The organization is an agent or agency of a public entity performing a governmental function on behalf of a public entity [or] having possession or custody of records of the public entity. See N.D.C.C. § 44-04-17.1(12), (15) (definitions of "public entity" and "record").

1998 N.D. Op. Att'y Gen. O-104, O-107.

There does not appear to be any specific delegation of authority from the Grand Forks County Board of County Commissioners to the NDIRF Board of Directors regarding the Thompson case. Furthermore, because political subdivisions may choose to purchase liability insurance rather than participating in NDIRF, see N.D.C.C. § 32-12.1-07, it can be assumed that the premium contributions received by NDIRF reflect the fair market value of the services provided by NDIRF and do not constitute "support by public funds" as defined in N.D.C.C. § 44-04-17.1(9). However, the alternative ways an organization may be a "public entity," as described in the preceding paragraph, are disjunctive. Thus, notwithstanding the fact that NDIRF may not be "supported by public funds," one could still conclude that NDIRF expends public funds, is created or recognized by state law or local ordinance to perform a governmental function, or is an agent or agency of its members.

This is not the first time the Office of Attorney General has been asked to determine whether NDIRF is a "public entity" subject to the state open records and meetings laws. Former Attorney General Nicholas Spaeth issued an opinion in August 1991 concluding that NDIRF is a "public entity."

The term "record" is given an expansive meaning. The term refers to all records retained by a public official in the course of his public duties. City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981) (Municipal personnel files are public records). Furthermore, where a government entity has delegated a public duty to a third party, documents in possession of the third party

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connected with public business are public records within the meaning of N.D.C.C. § 44-04-18. Forum Publishing Company v. City of Fargo, 391 N.W.2d 169 (N.D. 1986) (Job [applications] in the possession of a private consulting firm hired by the city to screen applicants for chief of police are public records).

NDIRF is the governing authority of a government self-insurance pool formed pursuant to N.D.C.C. chs. 26.1-23.1 and 32-12.1. A relationship exists whereby the members of NDIRF have by law or contract delegated the transaction of lawful business to NDIRF; therefore, NDIRF falls within the meaning of the term "agencies" as used in sections 44-08-19 [sic] and 44-08-18 [sic]. See Forum Publishing Company, 391 N.W.2d at 172. The governing body of a government self-insurance pool supported by public funds and spending public funds performs a government function. NDIRF's function is no different from that of the governing body of a political subdivision which elects to establish an individual self-insurance fund, except that NDIRF is the governing authority designated to administer pool funds on behalf of numerous participating members. Accordingly, NDIRF is subject to the open meetings and open records laws.

Letter from Attorney General Nicholas Spaeth to Ken Solberg (August 2, 1991). See also Daily Gazette Company, Inc. v. Withrow, 350 S.E.2d 738 (W. Va. 1986) (records in possession of public entity's insurer are "public records" under state open records law, notwithstanding confidentiality clause in the settlement agreement).

In its response to this office's inquiry, NDIRF disagrees with the August 1991 opinion of Attorney General Spaeth. The two main reasons in the 1991 opinion for concluding that NDIRF is a public entity are that NDIRF 1) serves as an "agency" of its political subdivision-members and 2) expends public funds.

As described earlier in this opinion, the definition of "public entity" includes "all . . . agencies of any political subdivision of the state." N.D.C.C. § 44-04-17.1(12)(b). The North Dakota Supreme Court has interpreted the term "agencies" on two separate occasions to mean a relationship "created by law or contract whereby one party delegates the transaction of some lawful business to another." Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986);

Grand Forks Herald Inc. v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960). The facts presented in this opinion are very similar to the facts in Forum Publishing Co. In that case, a public entity entered into a contract with a third party under which the third party would perform a governmental function. The court's conclusion applies very well to the first issue presented in this opinion:

If the City had undertaken this task without hiring [Personnel Decisions, Inc.], the applications would clearly have been subject to the open-record law. We do not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in the possession of PDI.

Forum Publishing Co., 391 N.W.2d at 172.

In the last year, this office has repeatedly held that a joint enterprise of several political subdivisions is an "agency" of a "public entity" under N.D.C.C. § 44-04-17.1. A joint enterprise of several southwestern North Dakota counties to operate a correctional center is an "agency" of those counties. 1998 N.D. Op. Att'y Gen. O-17, O-20. More recently, this office concluded that an association of soil conservation districts to coordinate conservation activities is an "agency" of its soil conservation district-members, notwithstanding the fact that the association was formed as a separate nonprofit corporation. 1998 N.D. Op. Att'y Gen. O-104, O-109. These opinions follow not only the August 1991 opinion of former Attorney General Spaeth, but also the North Dakota Supreme Court decisions in Forum Publishing Co. and Grand Forks Herald v. Lyons.

NDIRF also argues that the August 1991 opinion is changed by the substantial amendments to the open records and meetings laws in 1997. See generally 1997 N.D. Sess. Laws ch. 381. Under these amendments, a fair-market-value test is used to determine whether an organization is supported by public funds. N.D.C.C. § 44-04-17.1(9). NDIRF's argument is misdirected; this office's inquiry did not suggest "support by public funds" as a basis for concluding that NDIRF is a public entity. As discussed earlier in this opinion, one can assume from the competitive market in which NDIRF operates that the premium contributions it charges its members reflect the fair market value of the self-insurance provided by NDIRF. Otherwise, the members would purchase liability insurance from a private insurance company. To

the extent the 1991 opinion relied on support by public funds as a basis for concluding NDIRF is a public entity, the opinion has been superseded by the 1997 amendments. However, the 1991 opinion, like current law, contained multiple, disjunctive reasons for concluding that NDIRF is a public entity.

NDIRF's argument that it is not a public entity relies heavily on Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830 (N.D. 1995). This reliance is misplaced, because NDIRF's position in this case is much different than GNDA's position in Adams County Record. In that case, public funds had been used to purchase specific goods and services. Also, there does not appear to be any suggestion in Adams County Record that GNDA was acting as an agent or agency of a public entity. Here, the funds have not been paid to a private organization for specific goods and services. Rather, the funds have been transferred to a joint enterprise and are administered by NDIRF on behalf of its members.

NDIRF's response overlooks the second main basis for former Attorney General Spaeth's conclusion in the August 1991 opinion: NDIRF is a public entity for the additional reason that it expends public funds.¹ N.D.C.C. § 26.1-23.1-01(1) describes a government self-insurance pool as two or more political subdivisions "that have united to self-insure against their legal liability." The concept of "self-insurance" was discussed by this office at length in 1995 N.D. Op. Att'y Gen. L-258 (Nov. 9 letter to Peterson). Self-insurance is more accurately known as "risk retention." 1995 N.D. Op. Att'y Gen. at L-259. It is the "antithesis" of insurance. Id. at L-260. Because the members of a government self-insurance pool retain their own risk, rather than purchase insurance, the members' contributions to the pool do not lose their identity as "public funds."

¹ In light of the conclusion that NDIRF is an agent of its political subdivision-members and is expending public funds, it is not necessary to determine whether NDIRF also is created or recognized by state law or local resolution or ordinance. One could argue that N.D.C.C. ch. 26.1-23.1 authorizes a type of organization, just like the state nonprofit and business corporation acts in N.D.C.C. chs. 10-19.1 and 10-33, but does not create or recognize a specific organization. However, in deciding to join the self-insurance pool, it is likely that the political subdivisions passed a resolution or ordinance under which NDIRF is specifically recognized.

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NDIRF states that it is an insurance company, and is therefore entitled to the same protection from the open records and meetings laws that a private insurance company would have. This claim completely disregards state law, which unambiguously states: "Any government self-insurance pool organized under chapter 32-12.1 is not an insurance company or insurer. The coverages provided by such pools and the administration of such pools does not constitute the transaction of insurance business." N.D.C.C. § 26.1-23.1-02 (emphasis added). Furthermore, NDIRF's unsupported statement that a private insurance company representing a public entity is not subject to the open records and meetings laws is questionable in light of the court's decision in Forum Publishing Co.

NDIRF's attempt to compare itself to a private insurance company shows that the line between an "agent" or "agency" of a political subdivision under Forum Publishing Co. and a private organization providing specific goods and services to a public entity for fair market value is not always clear. However, that line does not have to be drawn in this case. The members of NDIRF have not exchanged public funds for insurance coverage. Rather, the members have decided to retain their own risks, pool their funds with other political subdivisions, and form or join a joint enterprise to administer those funds. Furthermore, any argument that NDIRF is not an agency of its political subdivision-members flies in the face of its exemption from federal income tax, which is limited to income from "essential governmental functions" which accrues "to a State or any political subdivision thereof."

NDIRF relies on statements in an earlier 1991 opinion from Attorney General Spaeth to Senator Solberg that once a political subdivision has paid funds to a government self-insurance pool, the money is then in the hands of the pool, and "the use of that money is regulated by the statutes regulating such entities and by their articles of incorporation if they are incorporated." Letter from Attorney General Nicholas Spaeth to Ken Solberg (Feb. 19, 1991). This opinion may need to be revisited, because by definition, the term "self-insurance" indicates that NDIRF's political subdivision-members still have an ownership interest in the funds transferred to NDIRF. In any event, former Attorney General Spaeth did not see any inconsistency with concluding that NDIRF could use the money it receives from political subdivisions as permitted under N.D.C.C. ch. 26.1-23.1, and with concluding that NDIRF is an "agency" of those political

subdivisions for purposes of the open records and meetings laws.² See Letter to Solberg (August 2, 1991). Neither do I. By participating in the pool as a joint enterprise, a political subdivision may lose some control over the public funds it contributes, but that does not change the status of the contributions as public funds.

In conclusion, NDIRF administers a pool of public funds on behalf of its members, which are all political subdivisions and therefore "public entities" as defined in N.D.C.C. § 44-04-17.1. Public entities that are each subject to the open records and meetings laws cannot avoid the requirements of those laws by incorporating a joint enterprise and transferring public funds to that enterprise. As former Attorney General Spaeth concluded, it was not necessary under N.D.C.C. § 26.1-23.1-03 for NDIRF to become incorporated, and such incorporation does not convert a joint enterprise of public entities into a separate private entity. NDIRF expends public funds and performs a governmental function as an agent or agency of its political subdivision-members. To conclude otherwise would make NDIRF ineligible for its federal income tax exemption under 26 U.S.C. § 115. Therefore, I agree with former Attorney General Spaeth that NDIRF is a "public entity" subject to the state open records and meetings laws.

Issue Two:

In addition to disputing whether it is a public entity, NDIRF asserts that its claim files, except to the extent the records are also included in the federal district court record of the case, are

² In fact, in a June 19, 1991, letter to former Fargo Mayor Jon Lindgren regarding whether NDIRF was a public entity, former Attorney General Spaeth referred to his February 1991 opinion to Senator Solberg:

In that recent letter, I observed that once a participating government makes an authorized payment to a government self-insurance pool the use of the money is controlled by statutes regulating such entities. However, I did not decide whether a government self-insurance pool is subject to the state's open meetings laws because it is a public entity or is supported by public funds.

(Emphasis added.)

confidential under N.D.C.C. § 26.1-23.1-06, which provides in part: "Information regarding that portion of the funds or liability reserves of a self-insured government pool established for purposes of satisfying a specific claim or cause of action is confidential."

The 1991 Attorney General's opinion concluding that NDIRF is a public entity also discussed this exception to the open records law.

N.D.C.C. § 26.1-23.1-06 provides that information regarding that portion of the funds or reserves of a self-insured government pool established for satisfying a specific claim or cause of action is confidential, and not discoverable in litigation except for limited purposes. Therefore, records containing this information are not public records. Furthermore, it is my opinion that when such information is discussed at a meeting which would otherwise be open to the public, that portion of the meeting relating to the confidential information may be closed. Otherwise, the purpose behind making the information confidential would be subverted. See Marston v. Gainesville Sun Publishing Company, 341 So.2d 783 (Fla. Dist. Ct. App. 1976), cert. denied, Gainesville Sun Publishing Company v. Marston, 352 So.2d 171 (Fla. 1977). This exception should be narrowly construed in a manner that does not frustrate the general policies providing for open meetings and access to public records.

Letter to Solberg (August 2, 1991) (emphasis added).

NDIRF argues that all the information in its claim file was "used to establish and adjust reserves." This argument applies the wrong legal standard under N.D.C.C. § 26.1-23.1-06, and is an unduly broad interpretation of the open records exception in that section. The statute applies to records "regarding" the amount of "reserves" set aside for a particular claim. The plain meaning of "regarding" is "[i]n reference to; concerning." The American Heritage Dictionary 1040 (2d coll. ed. 1991). Thus, it is not enough that records are used to determine the amount of reserves to set aside; the records must actually refer to or concern those amounts.

The North Dakota Supreme Court recently held that an exception to the reasonable fee requirement in the open records law for a driver's abstract does not apply to the source documents for the abstract. Robot Aided Manufacturing, Inc. v. North Dakota Dep't of Transp., 589

N.W.2d 187 (N.D. 1999). Similarly, the open records exception in N.D.C.C. § 26.1-23.1-06 for records regarding amounts of reserves does not extend to the source documents on which the records are based, unless those source documents also "refer to" or "concern" the amount of reserves set aside for a particular case.³

In response to the opinion request, a staff attorney in this office reviewed the NDIRF claim file requested by Mr. Dohman. Of the voluminous file regarding the Thompson case, only a few of the documents contained information referring to or concerning the reserve amounts that were set aside in the case. These documents consisted of periodic computer printouts showing the current total reserves set aside for the claim and for administrative expenses incurred as a result of the claim, and occasional file memos from a staff member at NDIRF explaining any changes to the reserve amounts. It is my opinion that only these few records are exempt from the open records law under N.D.C.C. § 26.2-23.1-06; the rest of the records are subject to the open records law and must be disclosed pursuant to Mr. Dohman's request.⁴

CONCLUSIONS

1. It is my opinion that NDIRF is a "public entity" subject to the open records and meetings laws.
2. It is my opinion that the open records exception in N.D.C.C. § 26.1-23.1-06 applies only to records which refer to

³ Mr. Spilde has offered to inform Mr. Dohman of the amount for which the Thompson case was settled, so whether the settlement amount is an open record is not an issue in this opinion. The amount paid on a claim is not a "reserve" that is "established" to pay a claim for purposes of N.D.C.C. § 26.1-23.1-06. The plain meaning of the term "reserve" refers to amounts set aside to pay a potential claim, rather than to amounts actually paid. American Heritage Dictionary 1051. Therefore, N.D.C.C. § 26.1-23.1-06 would not apply, and any settlement agreement by NDIRF or its attorneys on behalf of one of its members, including the amount paid, would be an open record. Any confidentiality provision in such a settlement agreement would be against public policy and void under N.D.C.C. § 44-04-18.10(3).

⁴ Many of the records also could have qualified as attorney work product while the case was still pending or reasonably predictable, but are open now that the case has been settled. See N.D.C.C. § 44-04-19.1.

or contain information specifically pertaining to the amount of reserves set aside for a specific claim, and not to the source documents in the file that are used to determine whether a change in reserve amounts is warranted.

STEPS NEEDED TO REMEDY VIOLATION

NDIRF must disclose, as an open record, all of its claim file in the Thompson case, except for those portions of the computer printouts and file memos which specifically refer to reserve amounts, to Mr. Dohman and to any other member of the public upon request.

Failure to disclose the records described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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